(3)

No. 02-667

Supreme Court U.S.
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IN THE

Supreme Court of the United States

October Term, 2001

ALEXANDRA YORK,

Petitioner,

v.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK;
CONRAD HARPER, a former Association President;
STEPHEN C. KASS, a former committee chair; and
JOHN FRENCH, a former committee chair,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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BRIEF REGARDING SUBJECT MATTER JURISDICTION

Petitioner respectfully submits this supplemental brief pursuant to Supreme Court Rule 15 (8) and Federal Rule of Civil Procedure 12 (h) (3) to raise the defense of lack of subject matter jurisdiction.[1]

THE DECISION MUST BE REVERSED BECAUSE DHR DID NOT HAVE SUBJECT MATTER JURISDICTION TO RECEIVE THIS DEFERRAL FROM EEOC OR TO ACT AS A FEDERAL TRIAL COURT, AND NEW YORK STATE COURTS DO NOT HAVE SUBJECT MATTER JURISDICTION TO RESOLVE FEDERAL QUESTIONS UNDER TITLE 7 ABOUT WHICH FEDERAL COURTS ARE DIVIDED

Lack of subject matter jurisdiction may be raised at any time during the proceedings and cannot be waived. *Fox v. State Univ. of New York*, 42 F.3d 135, 140 (2d Cir. 1994), *cert denied*, 515 US 1169, 115 S.Ct.2634 (1995);

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[1] Supreme Court Rule 15 (8) provides that a supplemental brief may be filed to present new matter. Fed. Rule Civ. Proc. 12 (h)(3) provides that the defense of subject matter jurisdiction may be raised at any time by parties or the court and cannot be waived. Petitioner has found no case regarding the procedure to be followed where subject matter jurisdiction is raised in a supplemental brief because of law discovered after filing the Petition for Certiorari. In the absence of precedent on point, petitioner relies upon the concurring opinion of Chief Justice Burger in *Fusari v. Steinberg*, 419 US 379, 391 (1975), also cited in *Board of Licensc Comm'rs of Tiverton v. Pastore*, 469 US 238, 250 (1985), that counsel have a continuing obligation to advise courts regarding their respective jurisdictions. *See also, Stern, et al, Supreme Court Practice* (8th Edition 2002) § 6.27 (factors affecting the reasons for granting certiorari other than new material can be presented in the form of a supplemental brief, citing Supreme Court Rules 15.6 and 8).

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Lytle v. Household Mfg., 494 US 545, 556n. 4 (1989); *Lambert v. Genesee Hospital*, 10 F.3d 46, 57-58 (2d Cir. 1993), *cert. denied*, 511 US 1052, 114 S. Ct. 1612 (1994). *See also, e.g., C. Wright and A. Miller, Federal Practice and Procedure §.* 1393 (1990); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980), *rehearing denied, cert. denied*, 449 US 953 (1980); *Athens Community Hospital, Inc. v. Schweiker*, 686 F.2d 989, 992 (D.C. Cir. 1982), modified in part on other grounds, 743 F.2d 1, *citing Laffey v. Northwest Airlines Inc.*, 567 F.2d 429, 474 (D.C. Cir. 1976), *cert. denied*, 434 US 1086, 98 S. Ct. 1281 (1978); *Promisel v. First American Artificial Flowers, Inc.*, 943 F.2d 251, 254 (2d Cir. 1991), *cert. denied*, 502 US 1060, 112 S. Ct. 939 (1992); *Halleran v. Hoffman*, 966 F.2d 45, 47 (1st Cir. 1992) (a party's objection to subject matter jurisdiction can be raised on appeal); accord, *Eisler v. Stritzler*, 535 F.2d 148, 151-52 (1st Cir. 1976). The defense of subject matter jurisdiction cannot be waived, and a court must consider it whenever it is raised. *See, e.g., Green v. Obergfell*, 121 F.2d 46, 54 (D.C. Cir.), *cert. denied*, 314 US 637 (1941); *Saverese v. Edrick Transfer and Storage, Inc.*, 513 F.2d 140 (9th Cir. 1975).

Lack of subject matter jurisdiction "is so fundamental a defect" that [FRCP 12(h)(3)] permits a court to recognize it at any time, even upon its own motion. *Bernstein v. Universal Pictures, Inc.* 517 F.2d 976 (2d Cir. 1975), on remand 79 FRD 59 (1975). Bernstein reversed dismissal of a complaint where factual issues as to whether a plaintiff had statutory employment status "was critical to determination of subject matter jurisdiction" under the National Labor Relations Act. *Id.* at 979-980.

Fed. Rule Civ. Proc. 12 (h) (3) directs that whenever a court lacks subject matter jurisdiction, it shall dismiss the action. In this case, that rule applies to DHR, because Title 7

(42 USC § 2000e-5 [c]) requires that where the State in which a claim arises has a law prohibiting the unlawful practice alleged and an agency authorized to grant or seek relief from that unlawful practice, EEOC must defer all Title 7 claims to that State agency for investigation and enforcement. *Id.* The federal-state work-sharing agreement that EEOC and New York have negotiated pursuant to § 2000e-5(c) permits DHR to hear and dispose of Title 7 claims. 29 CFR § 1601.13 *et seq.; see also Kremer v. Chemical Construction*, 456 US 461 (1982); *York v. Association et al.*, 286 F.3d 122 (2d Cir. 2002); *Ryan v. New York Tel. Co.*, 62 NY 2d 494, 499, 478 NYS2d 823, 825-26 (1984). Because EEOC permits New York to hear and make final disposition of Title 7 claims, EEOC has effectively deputized DHR as a federal trial court that is subject to the FRCP 12(h)(3) defense of lack of subject matter jurisdiction.

In order for a State to obtain subject matter jurisdiction over Title 7 claims from EEOC, the state employment discrimination law and the state administrative agency that administers that state law must satisfy §. 2000e-5(c) requirements for deferral. The § 2000e-5(c) qualifications for an EEOC deferral agency are: 1. the State must have a state law that makes unlawful discrimination based on race, color, religion, sex, national origin or disability; *and* 2. the State administrative agency must be empowered to grant or seek relief from the unlawful practice, or institute criminal proceedings. 29 CFR §.1601.70 (2002). Where a State does not satisfy both these Title 7 requirements for deferral, that State cannot assert jurisdiction over federal claims, because State agencies that lack the law or enforcement procedures required by federal law are not appropriate deferral agencies contemplated by Title 7. *See, e.g., Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F. Supp.1028 (9th Cir. 1970), *vacated on other grounds*, 400 US

1004 (1971), 91 S. Ct., 562 (1971); *Cunningham v. Litton Industries*, 413 F.2d 887, 891 (9th Cir. 1969).

A general state anti-discrimination law does not satisfy Title 7 deferral requirements where that law does not prohibit the specific unlawful acts alleged or protect the specific plaintiffs alleging them. 29 CFR §. 1601.13. For example, a State law that does not specifically prohibit sex discrimination complaints or cover non-profit organizations does not have subject matter jurisdiction over those classes of claims. *Id.* EEOC therefore cannot defer such claims to that State. *Id. See also, Leis v. Opportunity Consultants, Inc.*, 441 F. Supp. 1314 (SD Ohio 1977) (no protection for sex discrimination inferred from general discrimination statute); accord, *McDonald v. General Mills Inc.*, 387 F. Supp. 24, 34 (ED Cal 1974) and *Donohue v. Shoe Corp. of America*, 337 F. Supp. 1357 (D.C. Cal 1972).

An EEOC deferral state must also offer effective remedy for the specific unlawful acts alleged, and general enforcement authority is insufficient where it cannot remedy the specific unlawful practices alleged. *General Ins. Co. of America v. EEOC*, 491 F.2d 133, 135 (9th Cir. 1974); accord. *EEOC v. U.S. Fidelity and Guaranty Co.*, 420 F. Supp. 244, 253-555 (D.C. Md. 1976); *Int'l. Brotherhood of Electrical Workers v. General Electric Co.*, 4 CCH EPD § 7614 (DC Ohio 1971). For example, courts have declined to infer a remedy for retaliation from general anti-discrimination state laws. *See, e.g., Neuces County Hospital District v. EEOC*, 518 F.2d at 897 (5th Cir. 1975) and *Bauman v. Union Oil Co.*, 400 F. Supp. 1021, 1027 (ND Cal. 1975).

In this case, the New York Human Rights Law (N.Y. Exec. Law §§ 296 *et seq.*) does not meet Title 7 requirements for deferral by EEOC, because it does not protect workers from employment discrimination unless they receive a salary

or wages. *See, e.g., State Div. of Human Rights v. GTE Corp.*, 105 AD2d 1082, 487 NYS2d 234, 235 (4th Dept. 1985); *Gallagher v. Gallagher*, 130 F.Supp. 2d 359 (NDNY 2001); *Robins v. Max Mara USA Inc.*, 923 F.Supp 460, 471 (SDNY 1996). Federal courts interpreting Title 7 have endorsed non-wage financial benefits as Title 7 compensation. *See, e.g., Hishon v. King and Spalding*, 467 US 69 (1984); *Haavistola v. Community Fire Co. of Rising Sun*, 6 F 3d 211 (4th Cir.1993); and other circuit cases cited in Petition for Certiorari at 13-14. Further, since New York law does not protect unsalaried workers, DHR cannot offer a remedy to unsalaried workers because they are not protected by state law.

Because the HRL does not protect unsalaried Title 7 plaintiffs and DHR cannot offer any remedy to those plaintiffs, New York law does not satisfy Title 7 deferral requirements, and EEOC could not defer York's Title 7 claim to DHR[2]. 42 USC 2000e-5 and 29 CFR §. 1601.13 (a) (2) . HRL §.297 (2.a) directs that after a complaint is filed, DHR must determine its subject matter jurisdiction and, if it finds it lacks jurisdiction, dismiss those allegations of the complaint. DHR should have dismissed York's state and federal employment allegations for lack of jurisdiction, for the reasons discussed above. *Compare Kordich v. Povill*, 676 NYS2d 331 (3Dept. 1998)[3].

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2 York first tried to file her claims with EEOC but it told her to file DHR. *See.* Petition for Certiorari at 5 and 22. The proof that EEOC deferred her case is that it later gave her a right-to-sue letter *(Id)*, which it cannot do in New York unless it first defers a Title 7 claim to DHR. 42 USC §. 2000e-5 (c).

3 *Moodie v. Federal Reserve Bank*, 58 F.3d 879 (2d Cir. 1995) dismissed an HRL complaint for a §. 297 (9) election of remedies where DHR did not have jurisdiction over the *respondent* Federal Reserve. Moodie did not reach the precedent question whether the purported election of remedies was annulled where, as here, DHR lacked subject matter jurisdiction to grant *any* relief to petitioner because she is not in the class

New York State courts do not have subject matter jurisdiction to resolve the existing conflict among federal courts regarding Title 7 compensation and employment status. Pet. for Certiorari at 6-20. Title 7 and HRL employment discrimination claims are decided under "identical standards" by federal and state courts in New York. *Kremer v. Chemical Construction Corp.*, 456 US 461 (1982). Pet. for Certiorari at 25. But not until this Court decides if an unsalaried worker can be a Title 7 employee and resolves the existing conflict among the circuits regarding this primary federal question, would the federal and state courts in New York have a governing legal standard to determine the secondary question of DHR's subject matter jurisdiction under state law. Only this Court can resolve conflicts among federal circuit courts regarding interpretations of federal statutes. *See, e.g., Udall v. Tallman*, 380 US 1, 16 (1965); *Kolstad v. American Dental Assn.*, 527 US 526 (1999). *See also United Housing Foundation Inc. v. Forman*, 421 US 837, 845-860 (1974) (Court had to define "security" under Securities Act of 1933 to determine federal court jurisdiction); *Mortenson v. First Federal Saving and Loan Assn.*, 549 F.2d 884 (3d Cir. 1977) (need to define "restraint of trade" under Sherman Anti-Trust Act); *Bernstein v.*

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of workers protected by the statute. In this case, where jurisdiction over parties is not at issue, that precedent question Moodie did not decide is dispositive. Lack of subject matter must annul a purported election of remedies, because it cannot be argued that a complainant would "elect" a remedy from an agency that is not authorized to hear *any* complaints from the unprotected worker. If either EEOC or DHR was mistaken about their respective subject matter jurisdictions, petitioner cannot be penalized for that agency error. *Mitchell v. Mid-Continent Spring Co. of Kentucky*, 466 F.2d 24, 27 (6th Cir. 1972), vacated and remanded, *cert. denied* 410 US 928 (1972), *Parker v. General Telephone Co.*, 476 F.2d 595, 596 (9th Cir. 1973); *General Ins. Co v. EEOC*, 491 F.2d at 136, *Cunningham v. Litton*, 413 F.2d at 891, *Leis v. Opportunity Consultants Inc.*, 441 F. Supp at 1314.

Universal Pictures, 517 F.2d at 979-980 (determination of employment status "critical" to subject matter jurisdiction).

Petitioner told the district court that DHR did not have jurisdiction of this case because by refusing to hear her employment claims it violated the terms of its work-sharing agreement with EEOC, pursuant to which EEOC had deferred her case to DHR. See, Plaintiff's (District Court) Memorandum of Law in Opposition to Motion to Dismiss the Complaint at 21-22; Pet. for Certiorari at 24. Neither the District or Circuit Court responded to that defense. Both courts below refused to grant a hearing on the primary factual question of employment compensation that was required to determine the secondary issues of employment status and subject matter jurisdiction.

CONCLUSION

The decision should be reversed and a new hearing granted in federal court, because DHR did not have subject matter jurisdiction to receive the claims deferred to it by EEOC or to act as a federal trial court to consider those claims, and New York courts do not have subject matter jurisdiction to resolve federal questions under Title 7 about which federal courts are divided.

Dated: New York, New York

December 3 , 2002

Respectfully submitted,

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APPENDIX

Appendix A
Supreme Court 15 (8) and Federal Rule of Civil Procedure 12 (h) (3)

APPENDIX A

Supreme Court Rule 15 (8)

Any party may file a supplemental brief at any time while a petition for certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter.

Federal Rule of Civil Procedure 12 (h) (3)

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.